IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: **BLUE CROSS BLUE SHIELD** **ANTITRUST LITIGATION** **(MDL NO. 2406)**	**Master File No. 2:13-CV-20000-RDP** **This Document Relates to** **Provider Track Cases**

PROVIDER PLAINTIFFS' RESPONSE TO SUBSCRIBER PLAINTIFFS' AND DEFENDANTS' POST-HEARING BRIEFS IN SUPPORT OF FINAL APPROVAL

As Provider Plaintiffs pointed out at the Fairness Hearing, Section uuu at page 16 of the proposed Subscriber Settlement Agreement expressly exempts the Providers' claims. Subscriber counsel made this point in slide 20 of the presentation at the Preliminary Approval Hearing and stated: "The providers are not parties to the settlement. They did not participate in the settlement. And our view is that this has no effect on their case." 11/16/20 Tr. at 55. The Provider Plaintiffs agree and have not objected to the Subscribers' settlement. Consistent with what the Subscriber Plaintiffs have presented to the Court, the Provider Plaintiffs would like to make clear that resolution of the Subscribers' claims, which are based on the Blues' sale of health insurance and administrative services, cannot and should not prejudice any of the Providers' claims, which are based on the Blues' purchase of healthcare goods and services.

All issues relating to the Provider Claims should be decided in proceedings in the Provider Track. Nevertheless, in an abundance of caution, Provider Plaintiffs will briefly explain why their claims would not be affected by approval of the Subscriber settlement.

In particular, the elimination of the National Best Efforts rule and the introduction of a second Blue bid, both of which apply to the way that the Blues sell their services, do not affect whether the Blues' continued use of exclusive territories for contracting with Providers must be

judged under the *per se* rule. If the Subscriber settlement is approved, the final approval order should not state or imply that that it affects the standard of review for the Providers' claims.

If the Blues begin to compete on a non-branded basis due to the elimination of National Best Efforts, Subscribers will have more choices, but Providers may not. Blue Plans commonly include "all-products" or "affiliates" clauses in their agreements with Providers. Declaration of H.E. Frech, III, Ph.D. (June 21, 2021) (Doc. No. 2786-1) ¶ 4. These clauses obligate Providers to service subscribers covered by out-of-area Blue plans at the locally negotiated prices, regardless of the type and brand of the insurance. *Id.* To capture profit and revenue from out-of-area Blue Plans' "Green" business, Blue Cross and Blue Shield of Alabama, for example, could create a Green network, require all Alabama Providers to join it through all-products or affiliates clauses in their contracts, and rent the Green network to out-of-area Blues who wish to sell Green policies in Alabama. *Id.* ¶ 5. Renting this network could be very attractive to the out-of-area Blue Plans because the locally negotiated prices paid to the Providers are low. *Id.* In this scenario, the all-products and affiliates clauses allow BCBS-AL to aggregate its market share with the share of the Green entrants. *Id.* ¶ 6. If the process leads to a larger Blue plus Green market share, this will enhance the monopsonistic buying power of the local Blue, harming competition in the buying market and harming Providers. *Id.* ¶ 6.

Allowing a second Blue bid, which may help some National Accounts, will likely harm Providers. If Blue Plans do in fact provide second competitive bids, presumably more employers will choose Blue Plans, increasing the volume of business of out-of-area Blue Plans where the National Accounts are headquartered. Providers, however, do not get a second bid; they still may contract only with their local Blue Plan, and serve the members of the out-of-area Blue Plans through BlueCard. Because BlueCard creates inefficiency and delay, more of the Providers'

payments will be delayed, and their administrative costs will rise. Frech Decl. ¶ 12. Moreover, if second Blue bids cause the total market share of all Blue Plans within an area to rise, the market power of the local Blue Plan—the only one with which the Provider may contract to serve members of all Blue Plans—will *increase*. *Id.*

The very different effect of the Subscriber settlement on Subscribers and Providers is not the only reason to clarify that the Subscriber settlement does not affect the standard of review for the Providers' claims. Moving the Providers' claims to the rule of reason because of the elimination of National Best Efforts would open a rift between this Court and the Northern District of Illinois, which held that territorial market allocation for the purchase of healthcare services is *per se* unlawful, with or without a restriction on unbranded revenue. *In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d 627, 634–38 (N.D. Ill. 2020). *Delta Dental* involved an association remarkably similar to the Blue Cross Blue Shield Association: it licenses the Delta Dental trademark to a group of independent dental insurers, which control the association and agree not to contract with dental service providers outside their exclusive service areas. *Id.* at 631–32. Relying in part on this Court's opinion on the standard of review in this case, *Delta Dental* held that the use of exclusive services areas for contracting with dental service providers, on its own, must be judged under the *per se* standard. *Id.* at 634–38. At the risk of being repetitive, it must be emphasized that *Delta Dental* is a provider case.

Since the Subscriber Settlement exempts Provider claims, there is no reason that the Subscribers or the Blues would offer a compelling reason to distinguish *Delta Dental* from the Providers' claims here, and they have not. *Delta Dental* was decided on a motion to dismiss, but the Subscribers' and Blues' briefs identify no aspect of the Blues' rules governing exclusive service areas (as applied to Providers) that differs materially from the plaintiffs' allegations about

the Delta Dental system. (Doc. No. 2868 at 4–6; Doc. No. 2869 at 11 n.4.) In fact, the Subscribers' lead counsel represent the plaintiff dental service providers in *Delta Dental*, where they are proceeding under the *per se* rule for claims arising from exclusive service areas for branded business.

Finally, it would be procedurally improper for a final approval order to hold that the Providers' claims must be evaluated under the rule of reason by virtue of the Subscriber settlement. Such an important decision deserves full briefing and argument in the Provider Track, which has not occurred here.

CONCLUSION

The Subscriber settlement will change the ways in which the Blue Plans can compete for Subscribers' business, but these changes do not apply directly to competition among Blue Plans for Providers' services, and they may in fact harm Providers. Therefore, a final approval order should not state or imply that it changes the standard of review for the Providers' claims. Any conclusion about the effect of the Subscriber settlement on the Providers' claims would be premature and unwarranted.

Dated: December 8, 2021

Respectfully submitted,

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